STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2003
v	No. 234789 Allegan Circuit Court
DAVID KEITH FARLEY, Defendant-Appellant.	LC No. 00-011735-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f), and sentenced to concurrent terms of twenty to forty years' imprisonment for each conviction. He appeals as of right. We affirm.

On the evening of September 22, 2000, the seventeen-year-old victim and her friend, Terry Seneker, made plans to go out together. Seneker and defendant, an acquaintance, picked the victim up from her home. The trio went to the liquor store where defendant, who was over the age of twenty-one, purchased a fifth of liquor. The group subsequently went to defendant's place of employment, a "barn-type" structure in Moline. Several other friends and acquaintances arrived and a party started. The majority of individuals at the party, including the victim and defendant, were drinking alcohol.

Several hours after the party started, the victim and defendant drove away from the party in a large, white Lincoln automobile. The victim testified that, after driving a short distance, defendant drove the automobile into a deep ditch filled with water. The prosecution alleged that while the vehicle was in the ditch, five sexual penetrations occurred. Evidence of five, separate sexual acts was offered at trial. The victim testified that she told defendant "no," tried to escape, and suffered both physical and mental injuries, as a result of the sexual assaults. Defendant testified that only one sexual penetration occurred, that the victim initiated it, and that it was consensual. His theory at trial was that the victim lied about the sexual assaults because she was remorseful and was afraid that her boyfriend or parents would find out about her conduct.

The jury acquitted defendant of two charges of first-degree CSC, involving alleged acts of oral penetration. They convicted defendant of the other three charges of first-degree CSC.

I

Defendant first argues that the trial court interfered with his right of cross-examination on two occasions and that this restricted his ability to fully probe the bias and motivations of the victim and another witness. We disagree. A trial court's decision limiting the scope of cross-examination is reviewed for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998).

> The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony. [*People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (Citations omitted).]

Here, knowing that the victim was on probation for retail fraud, counsel for defendant asked the victim on cross-examination whether she knew what would happen to her if she were caught drinking. The trial court sustained the prosecutor's unspecified objection to the question. Defendant argues on appeal that the jury should have been allowed to consider that the victim's underage consumption of alcohol would constitute a violation of her probation. He claims that this information would have demonstrated the victim's motive or bias for lying about the sexual assaults. Defendant does not, however, explain his position, and we believe, to the contrary, that the answer to the question could actually have strengthened the victim's testimony. The victim admitted that she was drinking alcohol. She testified that she was afraid to inform the police about the assaults because she was drinking alcohol and did not want her parents to find out about her conduct. The fact that the victim eventually went to the police, knowing what the consequences of her drinking might be, would not have assisted defendant's case. Further, we disagree that the trial court abused its discretion by limiting defendant's cross-examination. Defendant was given a reasonable opportunity to test the victim's bias and motivations, and the jury was aware that the victim was on probation. She also testified that she was on probation for retail fraud, and acknowledged that she was not supposed to be drinking alcohol on the night in question.

Defendant also argues that the trial court improperly limited his questioning of Callan Bell, who testified immediately after the victim. Defendant sought to impeach the victim's testimony regarding the sexual assaults by cross-examining Bell about statements the victim allegedly made on the day after the assaults. The prosecutor objected on the ground that the questions called for hearsay responses and that, in order for the questions to be proper, the victim should have been questioned about the alleged statements first. The trial court ruling sustaining this objection was not an abuse of discretion. "Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted." *People v Kohler*, 113

Mich App 594, 599; 318 NW2d 481 (1981). MRE 613(b), which governs the use of inconsistent out-of-court statements for impeachment purposes, provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same . . . ." In this case, defendant sought to use extrinsic evidence of the victim's prior inconsistent statements without affording the victim an opportunity to explain or deny those statements. The trial court properly sustained the prosecutor's objection, and did not abuse its discretion in limiting defendant's improper cross-examination.

II

Defendant also challenges both the trial court's denial of his motion to quash the information and the sufficiency of the evidence presented to the jury with respect to the charges. We review de novo a circuit court's decision to deny a motion to quash to determine whether the district court abused its discretion in ordering bindover. *People v Mason*, 247 Mich App 64, 70-71; 634 NW2d 382 (2001).

"To secure the binding over of a defendant, the prosecution must present to the district court sufficient evidence establishing, as a matter of law, that the defendant probably committed the offense charged." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Circumstantial evidence and reasonable inferences are sufficient to support a bindover. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Errors or deficiencies in the proofs at the preliminary examination, however, are harmless if sufficient evidence is presented at trial to convict the defendant of the charges. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996), citing *People v Hall*, 435 Mich 599; 460 NW2d 520 (1990). Thus, the sufficiency of the evidence must first be reviewed. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *Terry*, *supra* at 452. We will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A victim's testimony alone, if believed, may be sufficient. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Defendant was convicted of violating MCL 750.520b, which provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
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> * * *
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:
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> (i) When the actor overcomes the victim through the actual application of physical force or physical violence.

> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

Recently, in *People v Carlson*, 466 Mich 130, 136; 644 NW2d 704 (2002), the Court considered the meaning of "force or coercion" as used in MCL 750.520d(1)(b), the statute proscribing third-degree criminal sexual conduct. That statute, however, specifically incorporates the definition of force or coercion set out in MCL 750.520b(1)(f). See *id*. at 136, n 4. Thus, the discussion in *Carlson* is applicable here. The Court stated:

> To be sure, the "force" contemplated in MCL 750.520d(1)(b) does not mean "force" as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. . . . [T]he prohibited "force" encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes. [*Id*. at 140.]

This Court has previously acknowledged that the use of force or coercion is not limited to physical violence and is to be determined in light of all the circumstances. *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). In *Brown*, the defendant found the victim alone in a bedroom, crying and naked. *Id*. He disregarded her requests to go home and to refrain from engaging in intercourse. *Id*. This was sufficient to prove force or coercion beyond a reasonable doubt because the defendant forced himself upon a victim in a situation where her lack of consent and helplessness were clear. *Id*. at 450-451. See also *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992) (where one of the acts of penetration occurred in an area where the victim was isolated from help).

MCL 750.520b(1)(f) also requires proof of personal injury. The term "personal injury" is defined as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(j). Physical injuries need not be permanent or substantial to satisfy the personal injury element of MCL 750.520b(1)(f). *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000).

In this case, defendant was charged in count I with digitally penetrating the victim. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational jury to determine that the elements of that charge were proved beyond a reasonable doubt. There was sufficient evidence of both penetration and force or coercion. Defendant drove the automobile into a ditch full of water. It was approximately 2:30 a.m., and the victim was unfamiliar with the rural area. She had been drinking alcohol for several hours and was underage. Defendant was aware of these facts. While they were in the ditch, defendant placed his hand up the victim's shirt and rubbed her breasts. She told him that he could not do what he was doing and physically pushed his hand away. A short time later, however, defendant put his hand between the victim's legs. She again protested, saying that she could not do anything with defendant because of her boyfriend. Defendant ignored these protestations and told the victim

not to worry. He undid her belt, put his hands in her pants and completed the act of penetration with his fingers, which the victim testified caused her pain. Defendant continued to tell the victim not to worry while she continued to talk about her boyfriend and tell defendant "no." In sum, defendant ignored the intoxicated victim's wishes and forced himself on her while they were in an isolated area. In addition, there was sufficient evidence of personal injury. The victim suffered an internal vaginal wound, which was bleeding upon examination. There was testimony that the wound could not have been caused by a penis but could have been caused by a fingernail. The victim also had two crescent shaped lacerations inside her labia. There was testimony that these may also have been caused by fingernails. Because there was sufficient evidence at trial to support defendant's conviction for count I, error in the bindover, if any, was harmless. *Dunham*, *supra*.

Counts III and IV charged defendant with two acts of sexual penetration of the victim's vagina with defendant's penis. Viewing the evidence in a light most favorable to the prosecution, the evidence was again sufficient to enable a rational trier of fact to determine that both counts were proved beyond a reasonable doubt. The victim testified that defendant penetrated her vagina with his penis on two occasions. Both acts took place after the victim managed to get out of the car, tried to run away, was caught, and was hit in the face by defendant. He called her a "psycho bitch" and told her to get back into the car, which was located in the ditch in a rural area. The victim testified that she reentered the car because she was scared. Inside the car, defendant held her and removed her clothing. She believed there was nothing she could do. She told him "no," and cried while he put his penis into her vagina. He stopped the assault when another vehicle passed. He subsequently pulled the victim on top of him, scaring her. A second act of penetration then occurred, during which defendant covered the victim's mouth with his hand. This testimony was sufficient to show that defendant used force to either induce the victim to submit, or to allow defendant to seize control of her for the purpose of accomplishing, the two acts of penile/vaginal penetration. *Carlson*, *supra.* The evidence of personal injury was also sufficient. Testimony was presented that the victim's vagina sustained significant injuries. The area was red, swollen, and painful to the victim following the assaults. There were also several small lacerations. In addition, the victim had bruises on her left knee and left flank, which she believed were caused when she tried to get away from defendant outside of the car and he grabbed her and pulled her onto the ground. The victim also testified that a bruise later formed on her left temple in the area where defendant hit her. A police officer who interviewed the victim testified that she saw a red mark on the victim's left temple. An initial assault before two acts of penetration may satisfy the personal injury element of both penetrations. See *People v Martinez*, 190 Mich App 442, 443-445; 476 NW2d 641 (1991). Furthermore, there was evidence of mental anguish. The victim testified that she was scared and crying throughout the sexual penetrations. Defendant continued to call her a "psycho bitch" and, after the penetrations, he informed her that she would never see her best friend again. The victim has required counseling for her resultant depression. Because there was sufficient evidence to support defendant's convictions for counts III and IV, error in the bindover on those charges, if any, was harmless. *Dunham*, *supra*.

Counts II and V charged defendant with two acts of oral penetration. The jury acquitted defendant of both of these charges. "[A] defendant has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476,

486-487; 581 NW2d 229 (1998). Any error in the submission of an unwarranted charge is cured when the defendant is acquitted of that charge. *Id*. at 486.[1] The only exception is where there is persuasive indicia of jury compromise. *Id*. at 487-488. In this case, there is no indication of jury compromise. This is not a situation where the defendant was convicted of the next lesser offense after an improperly submitted greater offense. *Id*. at 488. There was also no clear record of unresolved jury confusion with respect to the charges. *Id*. Furthermore, the jury did not return logically irreconcilable verdicts. *Id*. It acquitted defendant of the only two charges alleging acts of oral penetration. With respect to both of those charges, the victim did not describe any actual penetration, and no physical injuries were specifically attributed to those two acts. Thus, the jury's decision with respect to those counts appears well-reasoned. Regardless of whether the evidence at the preliminary examination was insufficient to bind defendant over on those two counts,[2] defendant is not entitled to a new trial. *Id.*; MCL 769.26.

III

Finally, defendant raises two sentencing issues. First, he challenges the trial court's scoring of fifteen points for offense variable (OV) 8. This issue is preserved because it was raised at sentencing. MCL 769.34(10). We will uphold a sentencing court's scoring decision if there is any evidence in the record to support the decision. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).

MCL 777.38(1)(a) provides that fifteen points should be scored if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." In *Spanke, supra* at 646-647, the Court interpreted the asportation language of OV 8 and determined that fifteen points is appropriately scored if the movement of the victim is not incidental to the underlying offense. It also determined that the movement need not be forcible. *Id*. at 647. In *Spanke,* the victims were moved voluntarily to the defendant's home. *Id*. at 648. OV 8 was scored at fifteen points, however, because the victims were moved to another situation of greater danger "because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others." *Id.*

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[1] *Graves, supra* at 488, overruled *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), which held that a defendant is always prejudiced when a jury is permitted to consider a charge that is unwarranted by the proofs.

[2] Count II charged defendant with oral penetration of the victim's vagina. At the preliminary examination, the victim testified that defendant performed oral sex on her. She explained that he touched his mouth on her vagina. She did not describe an act of penetration. Thus, it appears that the evidence at the preliminary examination was insufficient with respect to that count. Count V charged defendant with penetrating the victim's mouth with his penis. There was evidence of penetration because the victim testified that she complied with defendant's request to suck on his penis. Further, there was evidence of force or coercion. The victim testified that she tried to get out of the car before the penetration and that defendant held and pushed her head down, and instructed her, during the penetration. Arguably, there was also evidence of personal injury because defendant had already injured the victim's vagina with his fingers, and the victim testified that the injury to her knee may have occurred inside of the car. This evidence appears sufficient to support the bindover.

In this case, the victim was moved voluntarily when she accepted a ride from defendant. Defendant took her for a ride ostensibly to get her to calm down after she became rowdy and was "play fighting." However, defendant drove the car into a ditch and made no effort to get it out of the ditch until after the sexual assaults occurred. As in *Spanke*, the crimes in this case could not have occurred without the movement of defendant and the victim to a location where they were secreted from observation by others. In addition, the two acts of penile/vaginal penetration for which defendant was convicted could not have occurred without defendant's use of force to get the victim to reenter the car after she attempted to run away. The evidence supported the scoring of fifteen points, and we uphold that decision.

Defendant also argues that the trial court sentenced him on the basis of inaccurate information. Our review of the record persuades us that this claim has no merit. Before the trial court sentenced defendant, it indicated that it believed defendant threw other parties, involving juveniles and alcohol, at his employer's place of business. The trial court specifically questioned defendant about whether there were other parties. Defendant indicated that the only party he threw at his employer's place of business was the one on the night at issue. The trial court accepted defendant's statement by indicating that it had the wrong impression. This case is distinguishable from the cases cited by defendant. In those cases, the defendants challenged the accuracy of information and the trial court did not respond. In this case, the trial court specifically questioned defendant in order to insure the accuracy of information used to sentence defendant. Resentencing is not required.

We affirm.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra